IN THE MATTER OF THE ARBITRATION BETWEEN:

COOK HOSPITAL, Cook, MN

And

AFSCME COUNCIL 65

BMS Case No. 15 PA 0970

OPINION AND AWARD OF ARBITRATOR

Richard A. Beens

Arbitrator

1314 Westwood Hills Rd.

St. Louis Park, MN 55426

APPEARANCES

For the Employer:

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For the Union:

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Date of AWARD: March 14, 2016

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement ("CBA") between Cook Hospital, Cook, Minnesota, ("Employer") and AFSCME Council 65 ("Union").[1] Jeremy Pozniak ("Grievant") was employed as a certified nursing assistant at the hospital and is a member of the Union.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on January 28, 2016 in Cook, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing arguments were submitted simultaneously on March 9, 2016. The record was then closed and the matter deemed submitted.

ISSUE

The parties agree that the issue to be determined is:

Did Cook Hospital have just cause, as required by the collective bargaining agreement, to terminate Jeremy Pozniak and, if so, what is the appropriate remedy?

FACTUAL BACKGROUND

The Cook Hospital and Care Center is operated by the Cook-Orr Hospital District, a public entity created pursuant to Minnesota law.[2] Grievant was employed as a certified nursing

[1] Union Exhibit M. (The Union Exhibit book received at the hearing did not have individual tab markers for the exhibits contained therein. I retained the order of exhibits as presented and have taken the liberty of marking them Union Exhibits A through M.)
[2] See cookhospital.org.

assistant ("CNA") in the Cook Care Center, a 28 bed assisted living facility adjacent to the hospital. Staffing of the Cook Care Center includes six nurses (both RNs and LPNs) and 28 CNAs. Grievant began working there part-time in March 2013 and became a full-time CNA[3] a short while later.[4]

The duties of a CNA can be summarized as follows: "*The Nursing Assistant is a caregiver who assists professional nursing personnel in providing resident care and maintaining efficient function for a designated time frame."* [5] Grievant customarily worked the afternoon shift which ran from 2:15 PM to 10:45 PM. In addition to a charge nurse, this shift was normally staffed by three CNA's, one "short-shift" CNA,[6] and an activities assistant. Their principal tasks consist of assisting residents in dressing, feeding, grooming, bathing, toileting, and peri-care.[7]

The incident at the heart of this grievance occurred during an afternoon/evening shift on January 19, 2015. An 85 year old male resident, "CS", was suffering from bowel incontinency and had soiled himself. Grievant and another CNA ("LZ") had to clean up CS while preparing him for bed.

LZ was 22 years old and had been employed for the first time as a CNA in November, 2014, approximately two months earlier. LZ worked with Grievant on the same shift and testified that he felt "intimidated" by Grievant. Testimony indicates the two shared a mutual

[3] CNA = Certified Nursing Assistant. An individual can become a CNA by successfully completing an approved training course and passing a skills test. They can then be listed in the Minnesota Department of Health's Nurse Assistant Registry. Listing on the registry insures that the individual meets state and federal requirements for working in nursing and certified boarding care homes.
[4] Employer Exhibit 2, 5 and 6.
[5] Employer Exhibit 3.
[6] "Short-Shift" personal only worked 4 hours to assist at times of peak workload.
[7] "Peri-care" refers to bathing a resident's genital and buttocks area.

dislike for each other. Grievant felt LZ was lazy and lacked needed knowledge. LZ felt intimidated by Grievant and disagreed with the manner in which he handled residents. Each had previously complained to supervisors about the other's performance.

On January 19, 2015, at 11:30 PM, about an hour after their shift ended, LZ phoned the Employer's Director of Nursing ("DON"), Julie Gerzin, at home. He was upset with Grievant's treatment of patients and allege that, while cleaning patient CS a few hours earlier, Grievant had told the patient, *"You shit yourself again and I'm going to be pissed."*[8] Z also related two other incidents that involved Grievant's interactions with patients. Both had occurred some weeks earlier and purportedly upset him. He alleged Grievant had referred to a female resident as having a "fat ass." In another case, LZ thought Grievant to be rude when he interrupted his conversation with a patient and said, "We have other stuff to do." However, neither was subsequently used as a basis for disciplining Grievant. The first incident could not be confirmed and the other did not rise to level of a disciplinary offense.[9]

Prior to calling Gerzin, LZ compiled notes regarding his complaints about Grievant.[10] However, these written notes make no specific mention of the incident involving CS.

On the following morning, January 20, 2015, Gerzin began an immediate investigation of LZ's allegations. She interviewed CS and made the following notes:

> *Resident was asked immediately regarding the above* (LZ's allegation) *and he stated "Well he told me he was mad because he had to clean me up." (CS) does have some*

[8] Employer Exhibit 23B.
[9] While the Employer spends a good deal of time in its Post-hearing brief discussing the other two incidents, both Gerzin's testimony and the investigative report sent to the Minnesota Department of Health (Employer Exhibit 46) indicate that the statement made to CS formed the sole factual basis for Grievant's termination.
[10] Employer Exhibit 38

hearing impairment but realized and recalled that the caregiver was mad to have to clean him. [11]

She also interviewed LZ who reiterated the allegations made on the phone the night before.[12]

Following these two investigative interviews, which were completed on the morning of January 20, 2015, Gerzin called Grievant at home and ordered him to come to a meeting along with his union representative at 2:15 PM that afternoon. The meeting was attended by Gerzin and Alicia Gagne, the Human Resource Director for the Care Center, on behalf the Employer. Union President Kathi Bowser attended along with Grievant. Bowser took contemporaneous notes at the meeting.[13] In pertinent part, they read:

Complaints – Res. Rights to dignity and vulnerable (sic) adult. If he "shit again he'd be pissed." Our job is to protect, lack of professionalism – Julie

Julie investigated – Jeremy says he didn't say it. Statements from staff & residents.

Mike T to walk Jeremy out of building.

Gerzin's notes of the meeting read similarly:

In the meeting Jeremy had Union Representation present (Kathi Bowser) and after the reason for termination of his position was read aloud to him he denied ever stating anything of the sort to the resident. This writer explained that I did have statements from co-workers as well as residents. He continued to deny it and stated, "well what do I do now if I disagree with this"? (sic) Alicia P, HR explained that she will be sending him his termination paper in the mail and that he can then take the necessary action with the union if he desired to.

Jeremy was escorted out of the building by Environmental Services Director Mike Tillotson without incident.[14]

[11] Employer Exhibit 23B
[12] Ibid.
[13] Employer Exhibit 39
[14] Employer Exhibit 23B.

According to Bowser, the meeting only lasted 5 to 10 minutes. Employer representatives estimated it lasted 15 to 20 minutes. Although they were given no written statements or allegations prior to or at the time of the meeting, Bowser and Grievant were required to sign an "Employee Performance Improvement Plan" at the end of the session.[15] The "Improvement Plan" simply noted that Grievant was terminated. The Employer sent a letter confirming Grievant's termination along with a copy of their "Internal Investigation Form" two days later.[16] The final letter stated: *"The termination is based upon violation of resident right to dignity and protection of vulnerable adults which is deemed gross misconduct."*[17]

As required by law,[18] the Employer reported the incident and Grievant's termination to the Minnesota Department of Health the following day.[19] The Union formally grieved the dismissal on January 23, 2015. They alleged violation of CBA Article XIII, Termination of Employment and Article XIV, Discipline, Dismissals, Demotions and Transfers. [20]

APPLICABLE CONTRACT PROVISIONS[21]

ARTICLE XIII

TERMINATION OF EMPLOYMENT

Section 2

The Employer electing to terminate services of employees covered by this contract, and who are regularly and permanently employed, shall give such employees two (2) weeks' notice of

[15] Union Exhibit B.
[16] Union Exhibit A.
[17] Employer Exhibit 29.
[18] Minn. Stat. § 626.5572, subd. 14-18
[19] Employer Exhibit 46.
[20] Employer Exhibit 30.
[21] Union Exhibit N.

termination of employment, or the Employer may, in lieu thereof, pay the employee two (2) weeks advance salary and immediately terminate the employment of the employee being discharged, except this shall not be applicable in cases of discharge for just cause.

ARTICLE XIV

DISCIPLINE, DISMISSALS, DEMOTIONS AND TRANSFERS

Discipline, discharges, demotions or transfers to a lower classification shall be made only for just cause. Employees who are proposed to be terminated are entitled to a pre-termination notice and an opportunity to respond as set forth in Cleveland Board of Education v. Loundermill, (sic) *The Employer agrees to grant an employee his/her due process rights.*

A fact finding meeting shall be conducted at which an accused employee shall have the right to examine Employer evidence presented against him/her.

The following criteria will be followed in the event that an employee's job performance is unsatisfactory. Complaints from co-workers, patients, residents and visitors regarding an employee's job performance will be reviewed, evaluated and correction action, if warranted, initiated.

All complaints against an employee shall be in writing and the accused employee must be provided a copy of complaints regarding him/her at such time as corrective action is undertaken.

Counseling shall be used as a continuing method for correcting employee problems and in the event the Employer finds it necessary to discipline an employee, such will be corrective rather than punitive. Except in cases involving gross misconduct, the employer shall observe measures of progressive discipline.

The Union president and the employee shall be given notice in writing of disciplinary action.

Progressive discipline will be applied as follows:

1. *Verbal Reprimand: The department manager will meet with the employee concerning the problem(s)/concern(s).*
2. *Written Reprimand: If the employee's job performance remains unsatisfactory, a written reprimand will be issued to the employee concerning the problem(s)/concern(s). The department manager will meet in conference with the employee at this time in an attempt to reach a mutually agreeable solution to the problem(s)/concern(s). The employee will have the opportunity to respond to the specific concern(s) and share in the problem-solving procedure. A specific time period will be designated for correction of the problem(s)/concern(s).*

3. *Suspension: If the employee's job performance remains unsatisfactory, a three day suspension without pay will be issued to the employee concerning the problem(s)/concern(s), upon consultation with the administration.*
4. *Termination: Following implementation of the preceding reprimand/conference procedure, if the unsatisfactory job performance is still noted, an employee will be subject to further discipline which may include termination of his/her employment, to be determined upon consultation with administration.*

Note: Any further reprimand, verbal or written, will constitute the next step in the disciplinary procedure, provided however, such discipline shall be for the same or similar reason.

In cases of gross violation of the rules and regulations, the Employer may deter from progressive discipline, up to and including possible discharge without notice by Administration submitting reason(s) for the discharge. The preceding reprimand procedure does not apply in this case.

All of the above steps except verbal reprimand will be documented and kept in the personnel file.

The Union Staff Representative, Union Steward and/or the Union President shall be allowed to accompany the disciplined employee in the discussion of disciplinary matters, including the discussion or adjustment of grievances.

MINNESOTA STATUTES §626.5572 DEFINITIONS

…

Subd. 2. Abuse. "Abuse" means:

(b) (2) use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening:

MINNESOTA ADMINISTRATIVE RULES

9555.7100 SCOPE.

Parts 9555.7100 to 9555.7600 govern the investigation and reporting of maltreatment of vulnerable adults…

9555.7200 DEFINITIONS

*Subpart 1. **Scope.** As used in parts 9555.7100 to 9555.7600, the following terms have the meanings given them.*

*Subpart 2. **Abuse.** "Abuse" means:*

…….

C. the intentional and nontherapeutic infliction of physical pain or injury, or any persistent course of conduct intended to produce mental or emotional distress.

POLICY AND PROCEDURE MANUAL

COOK HOSPITAL AND NURSING HOME[22]

POLICY

The facility must, with courtesy, promote and care for you in a manner and environment that maintains or enhances your dignity and respect in full recognition of you individuality.

PROCEDURE

….

2. Nursing staff will provide private personal care with courtesy and respect to the residents…

DISCUSSION

It is well established in labor arbitration that, where an employer's right to discipline an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

In determining the question of whether the employer acted with "just cause," the arbitrator is called upon to interpret the phrase as a term of art which is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for guidance as to the meaning of just cause, his essential role is to interpret the contract in determining whether a given action was proper.

[22] Union Exhibit K.

A "just cause" consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied of the relevant rule or policy, and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined conclusion and was Grievant accorded due process? Finally, did Grievant violate the work rule in question?

Has the Employer relied on reasonable rules and policies as a basis for disciplinary action? In a word, "yes." Two sets of rules were applicable to the acts at issue: first, those set forth by Minnesota state law regarding the treatment of vulnerable adults and, second, the Employer's own policy regarding treatment of residents. Both are eminently reasonable. Minn. Stat. §626.5572 and Minnesota Rules §§ 9555.7100 to 9555.7600 contain the statutory and rule bases for the protection of vulnerable adults. The Employer's policy requiring treatment of residents with courtesy and respect is equally appropriate. The statute, rules and employer policy all have self-evident validity. No one, and vulnerable adults in particular, should be subject to gratuitous harm. CS, the patient in this case, is a vulnerable adult by definition.[23] As a nursing home resident, he is entitled to protection from exploitation and harm by those who are tasked with caring for his daily needs.

[23] See Minn. Stat. §626.5572, Subd. 21 (1).

Was the employee aware of the relevant statute, rule and policies? Clearly so. First, all citizens are presumed to know the content of our governing laws. Second, the record contains numerous documents, signed by Grievant, which confirm his knowledge and understanding of provisions governing his work conduct.[24] Finally, the Union makes no contention that Grievant did not understand the conduct expected when treating residents.

Were the facts of the case fully and fairly gathered and was Grievant accorded due process? The Director of Nursing interviewed both CS and LZ the morning following the incident. While signed, verbatim statements were not taken, she made contemporaneous, albeit cryptic, notes. Thereafter, the Employer's actions became problematic. Although Grievant was called to a meeting scant hours later the same day, his termination was already a foregone conclusion. The Employer paid minimal obeisance to Article XIV of the CBA in at least two respects: first, the contract requires,

> *"Employees who are proposed to be terminated are entitled to a pre-termination notice and an opportunity to respond as set forth in Cleveland Board of Education v. Loundermill* (sic). *The* Employer *agrees to grant an employee his/her due process rights."*[25]

Second, the CBA also states,

> "*A fact finding meeting shall be conducted at which an accused employee shall have the right to examine Employer evidence presented against him/her.*
>
> *….*
>
> *All complaints against an employee shall be in writing and the accused employee must be provided a copy of complaints regarding him/her at such time as corrective action is undertaken."*[26]

[24] Employer Exhibits 2, 3, 16, 17, and 27.
[25] Union Exhibit N, Article XIV, p. 24.
[26] Ibid.

Both Employer representatives who attended the January 20, 2015 meeting acknowledge deciding to terminate Grievant prior to interviewing him. Based on the hearing testimony, it appears Grievant was neither given a written copy of the evidence nor allowed to do any more than briefly respond to oral accusations. He was not shown the Director of Nursing's interview notes nor was he informed of his accuser's identity. Grievant was told the Employer had statements from *"coworkers and residents"* – erroneously implying multiple witnesses to the alleged conduct when, in fact, LZ and CS were the sole sources. Although he denied making the statement to CS, the "fact-finders" made no attempt to elicit his version of the incident. The Union representative's silence is most likely a reflection of having first heard of the issue at that very meeting. What occurred smacks more of a "kangaroo court" than a Loudermill Hearing – a "show trial" rather than a true exercise of due process.

On one hand, the Employer's anxiety over compliance with Vulnerable Adult laws is understandable. Allowing or failing to report abuse of vulnerable adults could expose the facility to correction orders, civil liability, and/or loss of licensure.[27] Nevertheless, the Employer has also bound itself to follow the provisions of a collective bargaining agreement. Compliance should be more than perfunctory. The Employer would hold the Union to no less. While the Employer's minimal nod to their CBA contractual obligations and due process may not be sufficient, in and of itself, to nullify Grievant's termination, it well could be in a different case.

Finally, did Grievant violate the work rules in question? The answer is, "Yes and No."

[27] Minn. Stat. §626.5572 Subd. 17.

I find it more likely than not that he made the alleged statement to CS, *"If you shit yourself again, I'm going to be pissed."* While LZ testified that he was certain about hearing the statement, he also bears a great deal of antipathy toward Grievant for perceived slights and/or alleged intimidation. Further, it isn't clear that CS actually heard Grievant's words or knew anything more than the fact Grievant was angry. Determinative, in my view, is the fact that Grievant chose not to testify at the hearing. I draw an adverse inference from his silence and believe he made the alleged statement.[28] Does this finding constitute just cause to discipline Grievant?

The Employer terminated Grievant based, in part, on a purported violation of the Vulnerable Adult Act.[29] This reliance is misplaced. In order to commit verbal "abuse," the acts must be "repeated or malicious."[30] In a remarkably similar case, the Minnesota Court of Appeals overturned the disqualification of a CNA who yelled at a resident, *"I forgot to put my [f-cking] gloves on and it's your fault, now you're going to [sh-t] all over my hands, you dumb [f-cker]."* [31] The Court found that, as here, there was no evidence the conduct was "repeated." In addition, the Court stated, *"To be malicious, conduct must be carried out with evil intent."* See the American Heritage College Dictionary 837 (4th ed. 2002) defines *"malicious" as "having the nature of or resulting from ….a desire to harm others or see others suffer."*[32] While Grievant's

[28] Elkouri & Elkouri, *How Arbitration Works,* Seventh Edition (2012), Chapter 8.4.H. No adverse inference can or should be drawn if criminal charges are a future possibility. For reasons to be explained later, Grievant's conduct is clearly not criminal.
[29] Union Exhibit A.
[30] Minn. Stat. §626.5572, Subd. 2 (b) (2).
[31] *In re Appeal of Staley,* 730 N.W.2d 289
[32] Ibid. at 298.

comment was wholly inappropriate, there is no evidence he intended to harm CS or make him suffer. In fact, there is no evidence that CS suffered any mental or physical harm.

The Court also stated, "*We neither condone appellant's behavior nor rule our other forms of employment discipline…"*[33] There is no question Grievant violated the Employer's policy requiring residents to be treated with "courtesy and respect."[34] On that basis alone, the Employer had just cause to discipline him.

Did Grievant's statement to CS constitute "gross misconduct?" In its Post-hearing brief the Employer conflates the definitions of "gross misconduct" and the standards most arbitrators use in determining just cause. "Gross misconduct" and "just cause' determinations require entirely separate analyses. The latter is used to determine the initial question of whether or not the Employer had sufficient reason to discipline Grievant. Once that is determined, the facts of the incident, its surrounding circumstances, and the overall seriousness of the conduct must be looked at independently to determine whether or not the violation rises to level of gross misconduct.

A case cited in Employer's brief, in which I previously found "gross misconduct" when defined as *"An intentional act which disregards the standard of behavior which an employer has a right to expect from its employee"* involved far more serious conduct than present here.[35] In that case an employee secretly stole and copied a letter containing confidential advice from the employer's legal counsel and shared it with her union in an attempt to gain an illegal advantage

[33] Ibid. at 299.
[34] Union Exhibit k.
[35] See MAPE and OPEIU Local 12, BMS Case No. 13RA-0075 (May 4, 2013) (Beens, Arb.)

in contract negotiations. Her actions were arguably criminal. Here, Grievant made a single inappropriate comment to a resident who may not have even heard the words.

In retrospect, the definition of gross misconduct I relied on in the prior case is far too broad. Taken to its logical extreme, as the Employer has here, virtually any violation of Employer rules could be deemed "gross misconduct." In reality, only conduct at the most serious end of the spectrum should be deemed "gross." The term should be reserved for the types of capital offenses that customarily warrant immediate termination, *"…theft, physical attacks, willful and serious safety breaches, gross insubordination, and significant violations of law on the employer's time and premises."*[36] In this case Grievant's misconduct does not rise to the "capital offense" level. He statement does not constitute gross misconduct.

Is discharge an appropriate penalty under the facts of this case? While an arbitrator has the power to determine whether or not an employee's conduct warrants discipline, his discretion to substitute his own judgment regarding the appropriate penalty for management's is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he must conclude the employer exceeded its managerial prerogatives and impose a lesser penalty. In reviewing the discipline imposed on an employee,

[36] *Common Law of the Workplace*, National Academy of Arbitrators, Second Edition (2005), §6.7 (3) (b).

an arbitrator must consider and weigh all relevant factors including employee's length of service, his work record, and the seriousness of the misconduct.

Grievant has worked at the Cook Care Center for over two years and had two minor disciplines, a verbal warning for attendance and a written warning relating to smoke breaks.[37] More important, he has no prior history of conduct similar to that involved in this case. His only performance evaluation states, *"He shows care and compassion towards the residents and has built relationships with them…"*[38] Several Union witnesses confirmed the reviewer's assessment. They testified unreservedly to Grievant's caring attitude and attention to residents. The incident in question appears isolated and atypical. While I don't mean to minimize or condone Grievant's conduct, termination is unduly harsh. A fifteen (15) workday suspension is more than adequate to render this a teaching moment for Grievant.

The Employer argued that Grievant should not be returned to work because of post-termination harassment and intimidation of other employees. I find their evidence unpersuasive. While some complained of Grievant's phone calls after he lost his job, there was no evidence of threats or violence – they simply didn't want to be put in the middle of the dispute. In my view the court very appropriately denied the Employer's attempt to obtain a Harassment Order against Grievant.[39] The complaints were motivated by nuisance, not harassment.

[37] Employer Exhibits 18 and 19.
[38] Union Exhibit H.
[39] See Minnesota Statute §609.748 et sec.

I recognize Grievant's future relationship with LZ may be problematic. In the first place, LZ did precisely the right thing in reporting Grievant's statements to CS. And, I don't doubt LZ felt and may still feel intimidated by Grievant. However, his testimony about subsequent encounters with Grievant in local stores and on local roads reflect his own nervousness rather than any premeditated stalking or intimidation. Grievant made no verbal or physical threats against LZ. It is not against the law to glower at someone. At some point everyone has to cope with the vicissitudes prickly interpersonal relationships. However, it should be noted that any retaliation against LZ for his report could subject the actor of very significant civil and employment penalties.[40] In any event, the Employer can adjust work schedules to minimize future contact between LZ and Grievant.

[40] See Minn. Stat. §626.557 Subd. 17 and Employer Exhibit 52.

AWARD

The Grievance is DENIED in part and SUSTAINED in part. While I find the Employer had just cause to discipline Grievant, his termination is reduced to a fifteen (15) day suspension. The Employer shall reinstate Grievant to his position as a Certified Nursing Assistant at the Cook Care Center forthwith. Further, Grievant shall be made whole for his lost wages and benefits minus deductions for the fifteen work day suspension, any unemployment benefits Grievant may have received, and any earnings from other sources between January 20, 2015 and the date of his reinstatement.

I shall retain jurisdiction over this matter for a period of sixty (60) days from the date of this award to resolve any further issues that may arise between the parties in implementation of this Award.

Dated:_____ _____

Richard A. Beens, Arbitrator